IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 952 OF 2004

Zilla Parishad Solapur

Through Chief Executive Officer,

Dist Solapur ... Appellant
(Orig.Defendant No.1)

V/s

1 Shri Vasant Bhimrao Shinde
(since deceased legal heirs)

1A Rajesh Vasantrao Shinde

Age 39 yrs. Occ.:Service

R/o 11, Manisha Colony,

Pandharpur

1B Sanjay Vasantrao Shinde,

Age 43 Yrs.Occ: Business,

R/o 11, Manisha Colony,

Pandharpur,

1C Sou Anjali w/o Abhimanyu Dhanake

R/o 31, Bhima Nagar, Jule-Solapur,

1D Sou Sangita w/o Uday Bhangare

Age 32 yrs. Occ: Work,

R/o A45 Nimiti Vihar, Bijapur Road,

Solapur.

2 Shri Madhukar D. Patil,

Age 53, Occ: Service at present

Collector, Dist. Thane,

Collector's office, Thane

3 The State of Maharashtra ... Respondents

(Res.No.1, Orig.Plaintiff, Res.No.2 & 3 Orig.Defendant No.2 & 3)

Mr.Nitin Jamdar for Appellant
Mr. G.S. Godbole for Respondent No.1(A) to 1(D)
Govt. Pleader.

Coram : A.S. Oka, J.

Dated : 11th March,2005

P.C. :-

1 Heard Shri Jamdar, learned counsel appearing for the Appellant and Shri Godbole, learned counsel appearing for the Respondents No.1(A) to 1(D)and learned Assistant Government Pleader for the Respondents No.2 and 3.Whether the initiation of the Departmental enquiry against the Respondent No.1 is illegal and whether the Civil Court can grant interest as provided in section 34 of the Code of Civil Procedure,1908 on unpaid gratuity are the substantial questions of law in this Appeal.

2 The Respondent No.1 is the original plaintiff. He filed a suit against the Appellant and the Respondent No.2 and 3 for declaration that the notice dated 1st August 1988 directing the departmental enquiry to be held against him is void and illegal and for perpetual injunction restraining the Appellant from proceeding with departmental

enquiry on the basis of notice dated 1st August 1988. By the said suit, he challenged the order dated 21st June,1990 of the Respondent No.3 granting a sanction to the initiation of the departmental enquiry against him. A prayer was made for a decree directing the payment of gratuity payable to the Respondent No.1 along with interest thereon from the date of institution of the suit and future interest @ 12% per annum.

3 The case of the Respondent No.1 is that he was in the employment of the Appellant for 28 years and he retired at the age superannuation on 31st July 1988. He referred to an order of compulsory retirement dated 7th October ,1987 and an order passed by the Appellant by which it was directed that the Respondent No.1 shall stand retired on 12st January 1988. The Respondent No.1 approached this court by filing a Writ Petition and the order of compulsory retirement was stayed. After reaching the age of superannuation,on 5th August 1988 the Respondent No.1 was served with a notice dated 29th July ,1988 issued by the Appellant by which he was informed about initiation of the departmental enquiry against him. Copies of charge and other particulars were annexed to the said notice.

4 The case of the Respondent No.1 is that decision for initiating the departmental enquiry against him was taken after 31st July 1988. It is submitted on behalf of

the Respondent No.1 that the departmental enquiry was initiated after he ceased to be an employee of the Appellant and therefore,initiation of the departmental enquiry was null and void. During the pendency of the suit, the Respondent No.2 State Government granted a sanction by letter 21st June, 1990 for the initiation of departmental enquiry and therefore, the plaint was amended for challenging the letter of sanction dated 21st June 1990.

5 The suit was contested by the Appellant.It was contended that the Notice impugned in the suit was actually dispatched on 29th July 1988 i.e. before the date of retirement of the Respondent No.1. It was contended that as the departmental enquiry was initiated, the payment of gratuity has been withheld. An additional written statement was filed for bringing on record the fact that there was a sanction granted by the Government on 21st June 1990 for the initiation of departmental enquiry against the Respondent No.1.

6 The learned trial Court dismissed the suit filed by the Respondent No.1.The learned trial Court held that notice of departmental enquiry was not the first notice but prior to that notice was given to the Respondent No.1 of his compulsory retirement and, therefore, it cannot be said that departmental enquiry was intiated after 31st July 1988.

7 An Appeal was preferred by the Respondent No.1 in

the District Court. The said Appeal was allowed. A decree was passed directing that the Appellant shall pay a sum of Rs.44,840.90 to the Respondent NO.1 with interest thereon @ 18% per annum on Rs.39,930/- from the date of the suit till realisation.The learned Appellate court has held that that the departmental enquiry was not initiated against the Respondent No.1 on or before 31st July 1988 and, therefore, in view of rule 27(2)(b)(i) of the Maharashtra Civil Services (Pension)Rules 1982 (hereinafter referred to as “the said Rules of 1982”) the initiation of departmental enquiry was illegal and void. It has also held that departmental enquiry was initiated in respect of events which took place more than 4 years before the institution of departmental enquiry and, therefore, departmental enquiry cannot be proceeded with. The learned Appellate court relying upon judgment of the Apex Court reported in JT. 2001 (6) S.C.285 in the case of Gorakhpur University & Ors. vs. Dr.Shitala Prasad and Nagendra and Ors., awarded interest @ 18% per annumon on the gratuity amount of Rs.39,930/-.

8 Mr. Jamdar, learned counsel appearing for the Appellant submitted that the notice itself shows that the departmental enquiry was initiated prior to 31st July 1988. He contended that the learned trial court has held that by notice new enquiry was not initiated but it was in continuation of the earlier enquiry started in 1987 when

notice of compulsory retirement was issued. He further contended that right of the Respondent No.1 to receive the gratuity is under the said Rules of 1982 and the said Rules being a complete code, provisions of section 34 of the Code of Civil Procedure,1908(hereinafter referred to as said Code) cannot be invoked. He relied upon Rule 129A of the said Rules of 1982 and stated that there was no administrative lapse on the part of the Appellant as the State Government has granted a sanction to the initiation of departmental enquiry against the Respondent No.1. He contended that therefore there is no interest payable under rule 129A.He urged that the Respondent No.1 succeeded for the first time in the Appellate Court when a finding was recorded that enquiry was not as per the rules. He contended that unless a case was made out under rule 129A of Rules of 1982, the Respondent No.1 will not be entitled to interest. Without prejudice to said contentions, he relied upon a Judgment of a division bench of this court reported in 2003(3)Mh. L.J. 691 in the case of Dattatray Ramchandra Phadnis vs. State of Maharashtra. He submitted that in view of the said judgment interest may be awarded at the rate of 10% as provided under rule 129A of Pension Rules.

9 Mr. Godbole, learned counsel appearing for the Respondent No.1 submitted that on the plain reading of the notice, a xerox copy of which is produced on record by the

Appellant shows that the same was dispatched after 31st July 1988. He urged that a sanction was granted by the State Government subsequently on 21st June 1990 and, therefore, initiation of enquiry was contrary to rule 27 of the said Rules of 1982. He contended that it was the case where the gratuity was unlawfully withheld by the Appellant and, therefore, the court was empowered under section 34 of the said Code to grant interest on the amount of gratuity. He submitted that the Appellant initiated the enquiry after 31st July 1988 and, therefore, payment of gratuity could have not be withheld as the initiation of inquiry was bad-in-law. He contended that Respondent No.1 was entitled to gratuity as a matter of right and therefore, if the gratuity was unlawfully withheld by the Appellant, the Respondent No.1 will be entitled to interest @ 18% per annum.

10 I have considered the rival submissions. A xerox copy of notice dated 29st July, 1988 is placed on record by the learned counsel appearing for the Appellant. Apart from the fact that the date which is written earlier is struck out and there is over-writing over the date 29th July 1988, it appears that notice was dispatched on 2nd August 1988. The notice bears two dates i.e. 29th July 1988 and 1st August 1988. It is to be noted that no oral evidence has been led on behalf of the Appellant. Apart from notice, no other material was produced on record to show that the

departmental enquiry was initiated on or before 31st July,1988. No evidence is placed on record to show that notice was prepared and was dispatched on or before 31st July 1988. Considering this aspect, the learned appellate court has recorded following findings.

> "However, the learned advocate for the Respondent No.1 has placed reliance upon the notice at Exhibit 64 issued by the Chief Executive Officer of the Respondent No.1 to show that the departmental enquiry was instituted on 29th July 1988. The notice at Exhibit 64 reveals that it was sent to the Appellant on 1st August 1988. It is true that on the above date 1st August,1988 there is date 29th July 1988 but in between there are dates which have been scored. In order to clarify this aspect it was for the Respondent No.1 to examine the concerned person from its office and to show that the departmental enquiry was in fa ct instituted before the retirement of the Appellant on 31st July 1988 A.N. Even it was for the Respondent No.1 to clarify as to why notice Exhibit 64 reads that it was sent to the Appellant on 1st August 1988. The date 1st August 1988 appearing on the notice at Exhibit 64 giving the Appellant an idea the departmental enquiry instituted against him, is material, since according to the Appellant, the departmental enquiry was instituted against him on 1st August 1988 i.e. after his retirement. The Appellant has also accordingly deposed but no oral evidence has been produced on behalf of the Respondent No.1 to show that the departmental enquiry was instituted before the retirement of the Appellant. For this purpose, it was for the respondent No.1 to produce the evidence to show that the charges, articles of statement etc. were signed by the Chief Executive Officer of the Respondent No.1 before the retirement of the Appellant. However, no evidence on this aspect has been produced by the Respondent No.1. Hence, only because

> undisputedly, the Appellant received the notice of the departmental enquiry on 5th August 1988, it cannot be said that the Respondent No.1 instituted the departmental enquiry against the Appellant before his retirement".

The Appellate Court, in my view, rightly proceeded to hold that the departmental inquiry was not instituted prior to the retirement of the Respondent No.1. The learned counsel for the Appellant has also placed reliance on the fact that a sanction was obtained from the State Government on 21st June 1990. It would be necessary to refer sub-rule 2 of rule 27 of Rules of 1982 which reads thus:

> " (2)(a) The Departmental proceedings referred to in sub-rule (1), if instituted while the Government Servant was in service whether before the retirement or during his re-employment shall after the final retirement of the Government Servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service.
>
> (b) The Departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment -
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> (i)shall not be instituted save with the sanction of the Government.
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> (ii) shall not be in respect of any event which took place more than four years before such institution, and
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> (iii)shall be conducted by such

> authority and at such place as the Government may direct and in accordance with the procedure applicable to the departmental proceeding in which an order of dismissal from service could be made in relation to the Government servant during his service “.

The learned appellate court has also held that departmental enquiry initiated against the Respondent No.1 was concerning the alleged events which took place more than 4 years back i.e. from 4th September 1984 to 28th February 1986 and the sanction was accorded by the State Government on 21st June 1990. In view of this position, the learned Appellate court has held that departmental enquiry could not have been initiated against the Respondent No.1 in view of clause (b)(ii)of Sub-Rule 2 of Rule 27.

11 The learned trial court in paragraph No.11 of its Judgment has observed that prior to 1st August 1988 notice of compulsory retirement was given to the Respondent No.1.Therefore, it cannot be said that departmental enquiry was initiated on 1st August 1988. Though the Appellate court has not stated anything specifically about this observation in its judgment, from the submissions made before the Appellate court on behalf of the Appellant it is obvious that said observation made by the learned trial Judge was not supported by the Appellant before the Appellate court. It has also to be seen that specific contention of the Appellant in written statement is that

departmental enquiry was initiated on 29th July 1988 by posting the notice and the chargesheet. It is not at all the case of the Appellant that any departmental enquiry was initiated prior to 29th July 1988 and that departmental enquiry was the continuation of earlier notice of compulsory retirement issued in the year 1987. Therefore, no fault can be found with the Appellate Court's judgment if a finding was recorded that the departmental enquiry initiated against the Respondent No.1 was illegal. Therefore, what follows is that the Appellant could not have withheld the gratuity payable to the Respondent No.1.

12 The learned counsel for the Respondent No.1 relied upon a decision of the Apex Court reported in JT 2001(6) S.C.285 in the case of Gorakhpur University & Ors. v. Dr.Shitla Prasad Nagendra & Ors. (supra). The Apex Court held in paragraph No.5 of the judgment that pension and gratuity are no longer matters of any bounty to be distributed by the Government to retired employees but are valuable rights acquired and property in their hands and any delay in settlement and disbursement whereof should be viewed seriously and dealt with severely by imposing penalty in the form of payment of interest.In the special leave petition before the Apex Court the challenge was to the Judgment of a Division Bench of Allahabad High Court by which pension and other dues payable were ordered to be paid with interest at the rate of 18% per annum. The Apex

Court confirmed the decision of Allahabad High Court.Shri Jamdar, learned counsel appearing for the Appellants placed reliance on the Judgment of a Division Bench of this court in the case of Dattatray Ramchandra Phadnis vs. State of Maharashtra & Ors.(supra). This was a case where pension payable to the Petitioner before this court was wrongly fixed and gratuity amount was illegally withheld. After considering the decision of the Apex Court, the division bench held that "In the case of Gorakhpur University vs. Dr.Shitla Prasad Nagendra & Ors. the High Court had granted penal interest at the rate of 18% and same was upheld by the Apex Court. Shri D.A. Gursahani, therefore, submitted that the Petitioner would be entitled for penal interest at the rate of 18% notwithstanding the rate of 10% as set out in Rule 129A of the Pension Rules.

It is a well known fact that the current market rate of interest either on fixed deposits in nationalised banks or on lending upto Rs.5,00,000/- does not exceed 10% in case of nationalised banks. It would, therefore, be appropriate to follow Rule 129A of the Pension Rules".

13 On reading of the said decision of Division Bench it is clear that Division Bench has not held that in case where gratuity is withheld, the interest on gratuity amount will be governed by Rule 129A of said Rules of 1982. From what is stated in paragraph No.11 of the decision, the Division Bench of this Court relied upon the rate of

interest on fixed deposits in nationalised banks or on lending upto Rs.5,00,000/- and after considering the said rate in the case before it Division Bench awarded interest at the rate of 10%as provided in Rule 129A of said Rules of 1982.A useful reference will have to be made in the judgment of the Apex Court reported in (1984)3 Supreme Court Cases page 369 in the case of Sudhir Chandra Sarkar vs. Tata Iron and Steel Co. Ltd. & Ors. In paragraph No.16 of the decision, the Apex Court held “pension and gratuity are both retiral benefits ensuring that the workman who has spent his useful span of life in rendering service and who never got a living wage, which would have enabled him to save for a rainy day, should not be reduced to destitution and penury in his old age. As a return of long service he should be assured social security to some extent in the form of either pension, gratuity or provident fund whichever retired benefit is operative in the industrial establishment. It must not be forgotten that it is not a gratuitous payment, it has to be earned by long and continuous service”.

In paragraph No.18 of the decision, the Apex Court held that pension is the retirement benefit and as a measure of social security, it can be recovered by filing a civil suit and there was no justification in treating gratuity on a different footing.

14 Thus, what has been held by the Apex Court is that

a civil suit is maintainable for the recovery of payment of gratuity. In the facts of case before the Apex Court it was held that the employer had declined to meet its obligation to pay gratuity on unreasonable ground and employer denied the benefit for a long time. The Apex Court held that the loss suffered by plaintiff will have to be compensated in terms of money. It is also held that the original plaintiff died before enjoying the fruits of his decree. Therefore, the rate of interest fixed at 6% by lower Court was enhanced by the Apex Court to 15% per annum. The interest was ordered to be paid by employer from the date of superannuation.There is one more decision of the Apex Court which is reported in (1985)1 Supreme Court Cases page 429 in the case of State of Kerala & Others vs. M. Padmanabhan Nair. The Apex Court held that pension and gratuity are the valuable rights and property in the hands of employer and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment. In the case before the Apex Court, interest at the rate of 6 per cent was awarded by the District Court and was confirmed by High court. The Apex Court enhanced the rate to interest at 12 per cent. The Apex Court has held “pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become under the decision of this Court, valuable right and property in their hands and any culpable delay in

settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment".

15 What has been held by the Apex Court is that there is a power vesting in the Civil Court to award interest in case where the payment of gratuity or pension is illegally withheld by an employer. In my view, power of Civil Court under section 34 of the Code is not circumvented or restricted by the provisions of said Rules of 1982 in view of the decisions of the Apex Court.

16 In the facts of this case, an attempt is made by the Appellant to create a show that departmental enquiry was initiated prior to 31st July 1988. The said effort became futile in view of what has been held by the learned Appellate Court. Therefore, this is a case where payment of gratuity was illegally withheld contrary to said Rules of 1982 and, therefore, the Civil Court was justified in granting interest. The interest at the rate of 18 per cent has been awarded by the Appellate Court. It is to be noted here that in the plaint the Respondent No.1 has prayed for interest at the rate of 12 per cent per annum. Interest is calculated on gratuity amount by the Respondent No.1 upto the date of suit at the rate of 12 per cent per annum. When the prayer made by the Respondent No.1 was for interest at the rate of 12 per cent, the learned Appellate Court could not have granted interest at the rate of 18 per cent per

annum. In the case Dattatraya vs. State of Maharashtra (supra), the Petition was filed in the year 1992. In the present case, the Respondent No.1 is litigating since the year 1989. The Division Bench of this Court in that case awarded interest at the rate of 10 per cent per annum. Considering the fact that the Respondent No.1 is in litigation for such long time,in my view, interest ought to have been granted at the rate of 12 per cent per annum and to that extent the decree passed by the learned Appellate Court will have to be modified.

17 Hence, I pass following order.

(i) Appeal is partly allowed.

(ii)Clause (4) of operative part of the impugned decree is modified by substituting the rate of interest of 12% instead of rate of 18%.

(iii)Save and except, the modification made to the rate of interest, the Decree is confirmed.

4 Time of 8 weeks is granted to the Appellant to deposit decretal amount in the trial court.

5 Considering the facts and circumstances of the case, the Appellant will bear its own costs and will pay a sum of Rs.2500/- by way of costs to the legal representatives of the Respondent No.1.

6. Parties to act on an authenticated copy of this order.

(A.S. Oka, J.)